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In The
Supreme Court Of The
United States

OCTOBER TERM, 1974

No. 74-836

PAUL D. GUTWEIN and State of Maryland Commission on Human Relations, *Petitioners*

v.

EASTON PUBLISHING Co., *Respondent*

To The Court Of Appeals of Maryland

RESPONSE OF EASTON PUBLISHING CO., RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully prays that Petitioners' Petition for Writ of Certiorari be denied by this Honorable Court.

JURISDICTION

The jurisdiction of this Court was invoked by Petitioners under 28 USC § 1257 (3).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The statutory provisions involved are found in Art. 49B Md. Code Ann. §§ 1, 3, 12, 13, 14, 15, 17, and 19 (which comprise the State Human Relations Commission, its powers and duties, its enforcement powers and the State Discrimination in Employment Act) and Title VII of the Civil Rights Acts of 1964, 42

USC 2000e (1970) as amended by the Equal Opportunity Act of 1972, 86 Stat. 103 (1972). The State legislation not appearing in Petitioners' Appendix E is set forth in Respondent's Appendix A. The Federal statutory provisions appear in Petitioners' Appendix F and Appendix C at p 13a.

The constitutional provisions raised in the Petitioners' request are the Supremacy Clause, Article VI, Cl.2, and the Fourteenth Amendment, Sec. 1, to the United States Constitution. They are set forth in Petitioners' Appendix G.

STATEMENT

Respondent accepts Petitioners' statement of facts with the exception of the conclusion improperly placed therein that Petitioner was left without a remedy for the violation of a civil right by the decision of the Maryland Court of Appeals. In addition Respondent wishes to point out to this Court that the original complaint filed by Petitioner with the State Commission was filed on August 20, 1969, but that contrary to the requirements of Art. 49B § 13 no written findings were made on the facts until April 21, 1972, some two years and seven months later. The public hearing before the Commission tribunal was not heard until December 11, 1972. Between the time of the written findings of April 21, 1972, and the public hearing, Respondent's key witness (Henry Montgomery), and the only witness for the Respondent familiar with *all* the facts in the case, was killed in an automobile accident.

QUESTIONS PRESENTED

Does the decision of the Maryland Court of Appeals holding that the State Human Relations Commission, in carrying forth its duty to eliminate discriminatory practices, has no statutory authority to grant monetary awards for compensatory or other damages, constitute a "state action" denying to the Petitioner the equal protection of the laws where the Petitioner

had remedies at law for damages caused by a violation of his civil rights before both Federal and State courts in addition to a right to complain and apply to the Federal Equal Employment Opportunity Commission?

Does Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, by requiring that a state agency (to which a person claiming to be a victim of an unlawful employment practice must apply before he can file with the EEOC) be authorized to grant or seek relief from unlawful employment practices, direct the State of Maryland to empower its enforcement agency to adjudicate and grant monetary awards; and if it has not done so in the opinion of the Court of Appeals, has Petitioner by that decision been deprived of his civil rights where he had remedies for damages at law before Federal and State courts in addition to a right to file an original complaint with the EEOC?

REASONS FOR DENYING A WRIT OF CERTIORARI

By Ruling that a State Administration Agency Was Not Granted an Unbridled Unregulated Power to Make Monetary Awards, that the Agency's Statutory Mission Was to Eliminate and Prohibit Discriminatory Employment Practices Rather than Adjudicate the Effects of such a Practice, and that Assessment of Damages for Violation of a Statutorily Protected Right was a Matter for Courts of Law, Under an Adversary System of Justice, the Decision of the Maryland Court of Appeals Is Not a State Action Denying Equal Protection of the Law to a Victim of Discriminatory Employment Practices Where the State and Federal Courts and Federal Agencies Are Open and Available to the Victim for this Purpose.

Title VII of the Civil Rights Act of 1964, 42 USC 2000e-2a makes it an unlawful employment practice for an employer to discharge an individual. . .because of such individual's race; and § 2000e-5c requires that any complaintant—whose State also prohibits the unlawful employment practice alleged and authorizes an agency to grant *or* seek relief from such practice—must wait 60 days after proceedings are commenced in the State agency before filing his complaint with the Equal Employment Opportunity Commission. Furthermore a statute of limitations is established to require a complaintant to bring forth his allegations and/or findings of the State Administrative Agency within 300 days of the institution of state proceedings or within 30 days after the termination of state proceedings whichever is earlier. Most important is § 2000e-5f and g which first informs the complaintant of his right to bring a civil action if EEOC can obtain no conciliation, and second specifies that the *court* may award back pay and any other equitable relief as the court deems appropriate.

The above statutory requirements elicit the following conclusions:

A plaintiff is not required to elect between remedies afforded via a state commission or a federal claim under § 2000e, but could pursue both until one claim reached decision. *Fitzgerald v United Methodist Community Center*, 335 F. Supp. 965 (DC Nebr. 1972).

The pursuit of a remedy in a state proceeding does not preclude the bringing of a federal action under § 2000e-5.

There is no requirement that the State Agency grant relief, only that it seek relief from an unlawful employment practice.

The EEOC itself cannot grant relief, either the complainant or the EEOC must institute an action in Federal Court.

Article 49B, Maryland Annotated Code § 1 et seq. is the Maryland Civil Rights Law. Section 19 makes it an unlawful employment practice for an employer to

discharge any individual. . . . . because of such individuals race, and Section 17 states that it is the policy of the State of Maryland to assure all persons equal opportunity in receiving employment. Section 14 directs the State Commission to issue. . . .an order requiring the "respondent" to cease and desist from the discriminatory act and to take such affirmative action as will effectuate the purposes of the particular subtitle (as stated in the sentence next above), and is given the prerogative of instituting an action in an equity court to enforce compliance with its order.

The Court of Appeals of Maryland is of the opinion that this law is sufficient to remedy the ills to which the law is directed, namely the elimination of discriminatory practices in employment. Similar laws of other states have been similarly interpreted as not including an unbridled grant of power to award monetary damages, concluding that the determination of damages for the breach of a statutorily protected right is a court function to be performed on an adversary basis at law unless the contrary should be explicitly expressed by the legislature—which in turn might raise a question in some states of the constitutionality of such an authorization or delegation of power. See Petitioners' Appendix C pp.14a-19a for cases treated by the Court of Appeals of Maryland on this point. Cf. *County Council v Investors Funding* 270 Md 403, 317 A2d 255 (1973). This is in conformance with the Federal requirement that the state agency be able to seek relief from unlawful employment practices. Nowhere is Maryland required to empower its enforcement agency to grant relief in the form of monetary award to compensate for the effects of an employee's discrimination. The Federal law is stated in the alternative as mentioned above.

It is being argued by the petitioners that the decision of the Maryland Court of Appeals completes a "manner of application" of its civil rights laws. It is then argued that such a scheme of application denies

constitutional remedies to a victim of discrimination, which a *fortiori* is a state action denying the equal protection of the laws to petitioner. But nowhere has the State of Maryland placed its power, property and prestige behind the admitted discrimination. *Burton v Wilmington Parking Authority*, 365 US 715, 725. (1961).

The State Court of Appeals for the purposes of the issues before it, held that, under rules of statutory interpretation, the Maryland General Assembly did not intend that the State Human Rights Commission, an administrative agency, have the power to make monetary awards for damages as a part of the affirmative powers granted to it to eliminate discriminatory practices within the State. This does not constitute an application of the State Civil Rights Laws on the Petitioner. Had the issue of damages come before the court on an appeal of a suit for damages at law claiming violation of a statutorily protected right we would have another question altogether; and if the court therein refused to award damages for violation of civil rights, then perhaps the question of state action might arise. But these were not the issues before the State Court of Appeals and Petitioner has not filed such a claim in any court nor stated that he could not do so.

Maryland's General Assembly simply has not yet seen fit to explicitly direct the State Commission to certify a complaint for suit in a manner similar to that of the EEOC under the laws and regulations which control the administration of its activities. Nor has the State listed specific court enforced remedies. *Gutwein v Easton Publishing Co.*, 272 Md. 563, 325 A2d 740. (See Petitioners' App. C at 13a.) But neither is there any prohibition against a victim filing a suit in State Courts. Forums are in fact abundant for the resolution of the question of damages to Petitioner; he has yet to attempt to utilize any of them. It is clear from the Federal Statute that the petitioner could have filed a complaint with the EEOC and perhaps the

EEOC would have gone to court to champion his rights. Note, however, that the Federal courts are themselves divided over the question whether the Federal statute authorizes payment of other compensation damages. *Gutwein v Easton Publishing Co.*, supra. (Petitioners' Appendix C at 13a and citations therein.) This question is not before the Court at this time under this case but merely underlines the principal that where statutory interpretation is the question some legislative delegations and authorizations of power are not to be lightly implied.

Furthermore, it can hardly be argued that the Equal Employment Title of the Civil Rights Act impairs the sanction of § 1982 of the 1866 Civil Rights Act (42 USC § 1982), Title VII does *not* pre-empt every other mode of protecting a federal right. Under § 1982, Federal Courts have fashioned effective equitable remedies. In addition, 28 USC § 1343 (4) created Federal jurisdiction for damages under any Act of Congress providing for the protection of civil rights. *Sullivan v Little Hunting Park* 396 US 229. Nowhere has Appellant alleged or shown that he has been denied these remedies or has been denied these avenues of seeking redress. Respondent certainly makes no argument that they do not exist. Section 2000e-7 of the Federal Act specifically recognizes that there will be other liabilities in addition to those in § 2000s-5g by stating "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty or punishment provided by any present or future law of any State or political subdivision of a State".

It is true that *Sullivan v Little Hunting Park, supra,* states, *inter alia,* that federal remedies for the protection of federal rights are available in state courts. The opinion further states by way of differentiation, that "as to *damages* 28 USC § 1343 (4) created federal jurisdiction for damages. . . . . under any Act of Congress providing for the protection of

civil rights." There are unquestionably remedies in the Maryland Courts for the damages the Petitioner claims, but this question is not before this Court nor was it before the Maryland Court of Appeals because Petitioner never raised the question below, nor has he proven any at best.

Resolution of issues between the government of Maryland and the respondent at the Commission level did and does not preclude additional (or even inconsistent) relief in favor of the private parties complainant in other litigation; and the conciliation offers required are a hope for rapid eradication of discriminatory employment practices. Cf. *US by Saxbe v Allegheny-Ludlum Industries, Inc.*, 63 FRD 1, 1973. The right to litigate is not abrogated. Cf. *Iron Workers Local No. 67 v Hart* 191 NW 2d 758 (1971).

The remedies oft spoken of here and which the Maryland Agency has to use as affirmative action to eliminate discrimination might include for instance: rehiring, reinstatement, restructuring in-house procedures and practices such as employment forms and seniority systems, injunctions and such other action which will effectuate the above described purpose of the law, namely, to eliminate and correct discriminatory practices. Hence, these affirmative powers, enforceable in a Maryland equity court must be powers directed towards ending the unlawful discriminatory practice and securing compliance with cease and desist orders. Cf. *Ohio v Lysyj*, 38 Ohio St. 217, 313 NE 2d 3 (1974). *Iron Workers Local No. 67 v. Hart*, supra. *Zamantakis v Commonwealth Human Relations Commission*, 10 Pa. Cmwlth. 107, 308 A2d 612 (1973). *Mendota Apartments v DC Commission on Human Rights*, 315 A2d 832 (DC 1974). The Maryland Fair Employment Practices Law is not unconstitutional because it is a prohibitory statute.

The Petitioner has failed to protect his legal rights, and there were a number of means by which he could, and may still be able, to do so, as have been outlined above. In fact *Crosslin v Mountain States Tel*

& Tel Co. 400 US 1004 (1971) held that in a situation where the state agency could *only attempt* to settle the dispute by conciliation and persusasion, the EEOC should give the state the initial opportunity to settle the matter, hence the argument that petitioner lost his rights because he had first to go to the state agency has no merit; it merely afforded Maryland a chance to eliminate discriminatory practices within its borders and under its jurisdiction before petitioner went to the Federal Agency and/or to court. Cf. *Love v Pullman,* 404 US 522 (1972).

The purpose of the Federal law being to eliminate discriminatory practices, and the State of Maryland clearly having a similar purpose, it cannot, therefore, be said that the law of Maryland is inconsistent with the provisions of the Federal law merely because the recovery of monetary damages by aggrieved complainants is left to courts of law. . . . . .as it is by the Federal law, 42 USC § 2000e-5f & g. It cannot be said that Maryland does not provide for the protection of and recovery for violations of Federal civil rights where no action has been instigated in any court to recover damages therefor where the court could take cognizance of its duty to, "so far as possible, eliminate the effects of the past" if indeed that is the standard applicable in State Courts. The Court of Appeals of Maryland heard an appeal under the State Administrative Procedure Act and its decision was limited to issues of administrative law and statutory interpretation, not to inquiring into the merits of a damage recovery suit that was never filed.

The fact that Petitioner picked no forum to pursue his claim for monetary damages does not invalidate Maryland's law nor make the decision of its Court of Appeals a state action depriving a person of his civil rights. Maryland has not restricted Petitioner's remedies; it has directed them to the legal forums of state and federal court systems. Federal laws also provide that the courts be the forum

which awards monetary damages.

The cases cited by the Petitioners such as *Sullivan v Little Hunting Park*, 396 US 229 (1968); *State of Minnesota v Bergeron*, 290 Minn. 351, 187 NW 2d 680 (1971); *Gilliam v City of Omaha*, 331 F Supp. 4 (D. Neb. 1971), rev'd on other grounds, 459 F. 2d 63 (8th. Cir. 1972) and *Betts v Easley*, 161 Kan. 459, 169 P. 2d 831 (1946), do not stand for the wide sweeping propositions petitioners set out. *Sullivan* held that an individual who was expelled by Community Recreational Corporation for advocating the cause of a negro seeking membership had standing under 42 USC § 1982 to sue for an injunction and monetary damages. In *Bergeron*, a discrimination in a real estate transaction case, the state statute specifically authorized the administrative agency examiner to fashion an equitable affirmative remedy. In *Gilliam*, an employment discrimination case, the state statute specifically authorized other affirmative action as may be appropriate, which may include reinstatement with or without back pay. *Burton v Wilmington Parking Authority*, 365 US 715 (1961) is not analogous to the instant situation, for in *Burton* the State of Delaware directly participated in a discriminatory act by sanctioning racial discrimination policies of a tenant of state owned property. *Evans v Newton*, 382 US 296 (1966), cited by Petitioners, is another case where the state by direct action sanctioned racial discrimination (maintenance of public park for whites only). *Shelly v Kraemer*, 334 US 1 (1948) held that state enforcement of restrictive racial covenants involving real estate was unconstitutional, which again involves direct state action.

While the remedy of damages has been recognized under federal law to be available to those whose civil rights have been violated on the basis of the Reconstruction Civil Rights Acts, of 1866, Enforcement Act of 1870, and Title VII, in court proceedings, states have construed their civil rights

acts as not empowering their administrative agencies charged with the administration and enforcement of those laws to allow monetary damages. The cases cited by Petitioners were either suits for damages which were decided under applicable federal laws by federal courts or by state courts construing state laws that specifically authorized the award of monetary damages.

In the opinion of Maryland State Court of Appeals, in Maryland, unlike some states, but like the Federal Government, questions of monetary damages are to be court litigated, and the State Fair Employment Practices Law, as so interpreted, does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

CONCLUSION

In conclusion, the Petitioner cannot complain in this forum because he has failed to protect his rights in Maryland or Federal courts. The Court of Appeals of Maryland in concluding that the Maryland Human Rights Commission, in its effort to eliminate discriminatory practices by affirmative action, may surely fashion a remedy without resort to issues courts are better adapted to litigate, has not committed an action which violates the equal protection clause of the Constitution.

There is no logical question concerning any State Action which would deny a federally protected civil right or of the obstruction by the State of Maryland of the purposes of Congress, therefore the Writ of Certiorari should not issue.

Respectfully submitted,

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RESPONDENT'S APPENDIX A

Excerpts from Art 49B, Md. Code Ann. (1957, 1972 Replacement Vol.)

§ 15. Enforcement of Commission's orders; complaint maliciously made; right to bring civil action not denied.

(a) If any respondent refuses to comply with an order of the Commission made within the scope of any of these subtitles, the Commission may, represented by its general counsel, institute litigation in the appropriate equity court of the county or in Baltimore City where the alleged discrimination took place to enforce compliance with any of the provisions of this article.

The court, in hearing said case shall be governed by the judicial review standards as set forth in the Administrative Procedures Act, § § 255-256 of Article 41 of the Annotated Code of Maryland, except that additional evidence if otherwise admissible under the law of evidence, may be presented to the court without the necessity of an application or without the necessity of showing reasons for the failure to present it at the hearing before the Commission.

§ 13. Investigation; findings; agreement for elimination of discrimination.

(a) After the filing of any complaint the executive director shall consider the complaint and shall refer it to the Commission's staff for prompt investigation and ascertainment of the facts. The results of the investigation shall be made as written findings. A copy of the findings shall be furnished to the complainant and to the person, firm, association, partnership or corporation (hereinafter referred to as

the "respondent"), against whom or which the complaint is made.

(b) If the finding is that there is probable cause for believing a discriminatory act has been or is being committed within the scope of any of these subtitles, the Commission's staff immediately shall endeavor to eliminate the discrimination by conference, conciliation and persuasion.

(c) If an agreement is reached for the elimination of the discrimination as a result of the conference, conciliation and persuasion the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the Commission setting forth the terms of the agreement. The Commission shall not enter an order at this stage of the proceedings unless it is based upon a written agreement. If no such agreement can be reached, a finding to that effect shall be made and reduced to writing with copies furnished to the complainant and to the respondent.

§ 12. Complaint to be filed with or issued by Commission; meetings of Commission.

(a) Any person claiming to be aggrieved by an alleged discrimination prohibited by any section of this article may make, sign and file with the Human Relations Commission (hereinafter referred to as the "Commission") a complaint in writing under oath. The complaint shall state the name and address of the person, firm, association, partnership, corporation, State agency, department or board alleged to have committed the act of discrimination together with the particulars thereof; and the complaint also shall contain such other information as may be required from time to time by the Commission.